IN THE

Supreme Court of the United States

October Term, 1944.

No. 559

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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Opinion Below.

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 45-48) is reported in 135 F. (2d) 453; the opinions on the second hearing (R. 68-84) are reported in 144 F. (2d) 221.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on July 6, 1944. (R. 84.) Petition for writ of certiorari was filed October 6, 1944, and was granted November 20, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

(1) Is the basing point pricing system unlawful under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act?

(2) Were the prices charged by respondents in good faith to meet the equally low prices of competitors?

Statement.

Instead of referring to the stipulation of facts, which, with the exhibits, constituted the only evidence in this case, petitioner makes reference to the findings of fact of the Federal Trade Commission. These findings of fact include the arbitrary inferences and conclusions of the Federal Trade Commission about which respondents complained in the lower court and which were considered by the lower court in its opinions.

The facts set forth in the stipulation (R. 12-27) are quite different in essential characteristics from the purported facts in the modified findings as to the facts and conclusion. (R. 49-64.)

The evidence offered by petitioner was that certain sales were made to certain purchasers at certain prices, all as shown by Commission's Exhibits 31 and 32. (R. 24.) The petitioner introduced no evidence showing how these prices were fixed or determined.

The evidence offered by respondents, which was uncontradicted by petitioner, was that when respondents first began manufacturing corn syrup in 1920, two large competing factories were then located in Chicago and were selling corn syrup in Chicago at prices lower than prices existing in any other market, and that the delivered prices for corn syrup in such other markets were generally equal to the Chicago delivered price plus published freight rates

on such syrup from Chicago to destination. Buyers were unwilling to pay as much for corn syrup manufactured by respondents as they were for corn syrup with which they were familiar and which was being manufactured by competitors of respondents. In order to make sales, it was, therefore, necessary for respondents to first quote the same prices as were quoted by competitors and then make whatever reduction in price that was necessary to obtain business.

After a short period of time, respondents found that their corn syrup was well received by the trade and that they could sell their corn syrup at the same price that competitors were selling. Accordingly, respondents adopted the practice of selling at the same delivered prices as their competitors, whatever they might be. Since June 19, 1936, respondents have sold such syrup at the same delivered prices as were quoted by competitors. (R. 18.)

At page 5 of its brief, petitioner states: "'Respondents' price at Chicago is not only a delivered price at that place; it is also a base price from which all delivered prices, including the price at Decatur, are calculated by adding freight from Chicago.'" (R. 51.) The reference is to the findings of fact of the Federal Trade Commission and not to the evidence. There is no evidence in the record to support this statement. The evidence was that certain sales were made at certain prices at Decatur, the site of respondents' plant. The Decatur prices at the respective times were respondents' mill or plant prices. We wish to stress this point at the outset and argue it in detail later because it is upon this false premise that petitioner seeks to build its case.

Respondents sold at the same delivered prices as their competitors. (R. 18.) These prices at markets other than Chicago were equal to the Chicago price plus freight from Chicago to the respective markets. Commission's Exhibits

31 and 32. (R. 24.) However, these prices were lower in every instance than a price determined by adding to respondents' Decatur price, freight from Decatur to destination. Commission's Exhibits 31 and 32 (R. 24), and Respondents' Exhibits 1a and 1b. (R. 25, 26.) This is demonstrated by the table at page 18 of this brief, which table was compiled from the said exhibits.

Judge Minton, in his opinion, said that the Court found it unnecessary to decide whether or not the basing point pricing system is legal or illegal. (R. 71.) However, he did find that such prices were discriminatory. As we point out in the argument, both Judge Minton in his majority opinion, and Judge Evans, in his dissenting opinion, reached this conclusion upon the erroneous assumption that respondents' mill price must be the same as the mill price of respondents' Chicago competitors. In this connection Judge Major, in his opinion concurring with the results reached by Judge Minton in his majority opinion but criticising the reasoning used, said:

> "I disagree with the statement, 'we do not find it necessary to decide whether or not the so-called basing point system is legal or illegal.' In my view the opinion is a holding that the price system is illegal. Notwithstanding respondent's apparent reluctance to meet this issue head on, it is squarely presented by its cease and desist order." (R. 78.)

It was Judge Major's opinion that the basing point pricing system is legal, and that since the evidence discloses only that respondents were using the basing point method of pricing, petitioner had failed to make out a case of price discrimination under Section 2(a) of the Act. (R. 78.)

Judge Minton and Judge Major agreed that respondents' prices were fixed and determined "in good faith to meet an equally low price of a competitor." (R. 73, 78.)

The statement in petitioner's brief relating to "booking

practices" also refers only to the Federal Trade Commissions' findings of fact and omits essential parts of the stipulated evidence.

The only evidence relating to the "booking practices" was evidence offered by the respondents. (R. 20-23.) This evidence was that for many years the industry had followed long established trade practices by which purchasers of syrup were permitted to purchase at the old price subsequent to a price advance. Competitors have told the trade that their price had been advanced, but that if the buyer would place an order with them at the price existing prior to the advance, it would be accepted. Respondents have been compelled to meet this competition. (R. 20.) The evidence of respondents disclosed four "booking practices" followed in the industry. (R. 20, 21.) Respondents' evidence further established the fact that the selling practices were in existence prior to the time respondents manufactured corn syrup and that they had no alternative except to follow reports of such competition. Respondents did not originate or adopt these abuses, but met the competition of others where necessary to retain their customers. (R. 21, 22.)

(1) Where a salesman or broker informed respondents that one or more competitors had granted a customer an extension of time in which to take delivery of syrup formerly booked at the older and lower price, respondents, "believing such report to be true," then granted similar extensions. (R. 22.)

(2) At the time of a price advance, respondents received from salesmen or brokers notification to enter orders for customers, some of whom respondents had not previously sold. In case of customers not previously sold, the order was usually cancelled some thirty days later because of a refusal of the buyer to give shipping instructions.

However, when there was a further upward change in price, respondents have been given shipping instructions and have made shipment. Respondents "suspect, but do not know," that some such bookings for customers were made without the knowledge of the buyer. (R. 22.)

(3) After a price advance, respondents have been informed by candy manufacturers that one or more competitors had told such candy manufacturers that without the knowledge of such candy manufacturers, orders had been entered in their behalf and that such competitor or competitors were prepared to make delivery at the older and lower price. (R. 22.) "When the customer had convinced respondent that it was meeting competition, respondent agreed to re-price the order to the lower figure." (R. 21.)

(4) Respondents received reports from tank wagon buyers that competitors had offered to sell them tank cars of syrup and to deliver such syrup in tank wagon lots at a later time. "Respondents, believing such reports to be true", sold such wagon buyers tank car lots at the lower and older price subsequent to a price advance and delivered in tank wagon lots. (R. 23.)

Judge Minton and Judge Major agreed that the prices charged by respondents as a result of these "booking practices" were "in good faith to meet an equally low price of a competitor." (R. 73, 78.)

Summary of Argument.

Petitioner contends respondents discriminated in price in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act by (1) the use of the basing point pricing system, and (2) the use of "booking practices".

I.

A. The basing point pricing system is not illegal. It is a long established practice in the industries of this country and has become embedded in the economic life of the country.

B. It is a system that had been in use under the Clayton Act prior to the amendment of that Act by the Robinson-Patman Act. No provision of the Robinson-Patman Act purports to declare the basing point pricing system illegal.

C. The legislative history of the Robinson-Patman Act discloses that it was the clear intent of Congress that the basing point pricing system should not be declared illegal.

D. As a result of using the basing point pricing system, respondents' delivered prices were lower in every case than their f. o. b. Decatur price plus freight to destination. Respondents' prices were, therefore, "made in good faith to meet an equally low price of a competitor."

II.

The evidence relating to the use of "booking practices" was produced solely by respondents. Petitioner did not make out a prima facie case against respondents, but, in any event, respondents' acts in every case were in good faith and were to meet a competitive situation occasioned by what respondents believed to be prior similar acts by respondents' competitors.

ARGUMENT.

The alleged discriminations against which petitioner complains are two: Those resulting from the use of the basing point pricing system and those resulting from the use of "booking practices".

Petitioner assumes that the basing point pricing system is illegal and that the prices resulting from its use are, therefore, necessarily discriminatory. That is the first issue in this case.

I.

The Basing Point Pricing System Is Not Illegal.

A. The "basing point" pricing system has been in general use for many years.

The "basing point" pricing system has been widely employed by industries in this country for more than fifty years. (45 Harvard Law Review 548.) (Werne, "Business and the Robinson-Patman Law," App. 36.) This has been especially true in the case of standardized products such as corn syrup, cast iron pipe, iron and steel, coal, lumber, cement, oil, heavy chemicals, barrels, lime, building materials and many other products. This question was considered by this court twenty years ago in the case of *Cement Manufacturers Protective Association, et al.* v. *U. S.*, 268 U. S. 588, where the Court said at page 598:

> "The use of basing points * * * is rather the natural result of the development of the business within certain defined geographical areas. * * * If there were no blanket freight rate, the competing mills must still use the rate from a given basing point in order to compete with the mills located in the vicinity of the

> chief point of production. In either case, the freight rate from the basing point is an essential element in making a delivered price since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement."

The basing point pricing system has been and is now recognized by many governmental agencies and this Court should take judicial notice of the administrative orders and decrees giving recognition to the system. *Salt Producers Association v. Federal Trade Commission*, 134 F. (2d) 354, 358; *Gay Union Corp., Inc. v. Wallace*, 112 Fed. (2d) 192, 195; *Benton Harbor St. J. G. & F. Co. v. Middle West Coal Co.*, 271 Fed. 216, 218.

The existence of the basing-point pricing system has been recognized and given limited approval on one other occasion by this Court. *Maple Floor Manufacturers Association v. U. S.*, 268 U. S. 563. Both this case and *Cement Manufacturers Protective Association, et al. v. U. S.*, 268 U. S. 588, were decided in 1925 and prior to the amendment of the Clayton Act by the Robinson-Patman Act.

B. Effect of amendment of Clayton Act by Robinson-Patman Act.

The charges leveled at the respondents under the complaint relate to actions by respondents only since June 19, 1936, the effective date of the Robinson-Patman Act. Inferentially the position of petitioner is that the basing point pricing system is illegal under some provision or provisions of the Clayton Act as amended by the Robinson-Patman Act, although it was not illegal under the Clayton Act prior to the amendment. A comparison of the provisions prior to the amendment of the Act with the provisions of the Act after the amendment discloses no basis for this

position. (App. 27, 28.) The Act as amended contains no reference to basing point pricing and there is no substantial difference in the provisions from which it might be reasonably concluded that the amendment sought to make the basing point pricing system illegal. To find the congressional intent contended by petitioner, it lifts a provision of Section 2 (a) inserted for the benefit of the seller and so distorts its meaning as to apparently serve petitioner's prupose. We refer to the following provision:

> "Provided, that nothing contained * * * shall prevent differentials which make only due allowances for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The difference in the cost of delivery referred to in this provision is not the difference that may arise from the use of the basing point pricing system. As is hereinafter demonstrated, a provision which would have made the basing point pricing system illegal, was stricken from the bill and we submit that the legislative history of the Act as hereinafter discussed, clearly discloses that not only was it not the intention of Congress to make the basing point pricing system illegal, but that Congress' intent was that the basing point pricing system should continue as a legal method of doing business. It is, therefore, only giving meaning to the intent of Congress to say that the reference to the difference in the cost of delivery is to a difference other than a difference that might arise from the use of basing point pricing system. The Federal Trade Commission is limited and restricted in its action by the authority it receives from Congress. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The Federal Trade Commission evidently shared this opinion as late as January 30, 1940. At that time the Assistant Chief

Counsel for the Commission urged the Temporary National Economic Committee to consider whether legislation outlawing the basing point pricing system should be recommended. It was then his position that the basing point pricing system could be reached only under theories of conspiracy and concerted action. (Rec. of Proceedings T. N. E. C., Vol. 4, Page 400.) No question of conspiracy or concerted action is involved in this case.

C. Legislative history of the Robinson-Patman Act.

An examination of the legislative history of the bill which became the Robinson-Patman Act discloses that when it was reported by the House Judiciary Committee as H. R. 8442 of the 74th Congress, it contained the following definition of "price":

> "(5) The word price, as used in this Section 2 shall be construed to mean the amount received by the vendor for each commodity unit, after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

The report of the committee, which accompanied H. R. 8442 as reported back, stated that the object of the definition was to eliminate the basing point or delivered price method of selling. The committee's report stated that the definition would require the use of f.o.b. method of sale. (House Reports 74th Congress 2287.) This definition was stricken by amendment, unanimously agreed to by the House. (80 Cong. Rec. 8140, 8224.)

Representative Patman, one of the authors of the bill, stated on the floor of the House that the definition of "price" was really an anti-basing point provision and that the Judiciary Committee had requested the chairman to introduce an amendment on the floor striking the provision from the bill. He stated that such action met with his approval. (App. 29, 30.)

Representative Citron, a member of the House Judiciary Committee in charge of the bill, stated at length the reasons why the basing point pricing system should not be made unlawful. (App. 31-34.) Among other things, Representative Citron said that if the price definition remained in the bill, it would result in enforcing f.o.b. shipping prices on manufacturers, in which case such manufacturers would not be able to compete with foreign manufacturers not subject to the provisions of the bill; that to compel all manufacturers to ship f.o.b. shipping point would compel the very definite localization of operations of all manufacturers and wholesalers, which would have the immediate effect of increasing cost, resulting from seriously limited volume production; that if the provision remained in the bill, it would mean the increased centralization of manufacturers in the more thickly populated industrial centers; that it would mean the further submergence of small industry and the small business man, which would actually tend to enhance monopoly in all branches of industry. The recognition that this definition of price was an anti-basing price provision, and that as such it should be eliminated from the bill is clear from the recommendations of other members of Congress. (App. 34, 35.) Nothing appears in the congressional debates nor in the reports of committees to the contrary.

When the bill was before the Senate, the debate clearly disclosed the same intent by that body. Senator Borah stated that it was his opinion that the bill would not have any effect upon the status of the basing point pricing system then used by steel, cement and other natural resource industry. (App. 35.)

It is clear that the members of Congress were aware of the fact that there was then under consideration a bill which concerned the basing point pricing system only.

(App. 32.) This bill was the Wheeler Anti-Basing Point Bill and was rejected by Congress. (80 Cong. Rec. 8102, 8223, 8224.)

By adopting the premise that the basing point pricing system is unlawful, petitioner seeks to accomplish the very thing that Congress refused to do.

The determination of the legislative intent and the application of the statute to the submitted facts are two distinct processes and the statute cannot be applied until the legislative intent has been ascertained. The decision in this case necessarily depends upon the intent of Congress.

In *Rector, etc. of Holy Trinity Church* v. *U. S.*, 143 U. S. 457, the Court said at page 459:

> "It is a familiar rule that a thing may be within the letter of the Statute and yet not within the Statute because not within its spirit nor in the intention of its makers." See also *Takao Ozawa* v. *U. S.*, 260 U. S. 178, 194.

In the recent case of *U. S.* v. *Johnson*, decided December 18, 1944, 65 S. Ct. 249, a somewhat similar question arose with reference to the construction of the Federal Denture Act. This Court held that the absence of a specific venue provision would in itself be significant, and that its significance is enhanced when it appears that the attention of Congress was directed by the Postmaster General to the desirability of authority for a discretionary trial either at the place of shipment or place of receipt. The Court stated at page 251,

> "In view of the keen awareness of enforcing officials as well as that of the members of the Committee on Interstate Commerce of the problems raised by venue in criminal trials, it is inadmissible to suggest either oversight on the part of Congress in failing to make provision for choice of venue or to make the cavalier assumption that that which is specifically provided for

> in other enactments * * * was authorized but through parsimony of language left unexpressed in the Federal Denture Act." See also *U. S.* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414.

It is apparent from the legislative history of the act that Congress appraised the basing point pricing system. In spite of repeated attempts to make the basing point pricing system unlawful, Congress refused to take such action. It is not within the province of this Court to appraise the system and were the Court so inclined, it is not in a position to do so upon the record in this case. The basing point pricing system is a method of doing business that has grown up through custom and usage during a long period of time and is extensively followed. It is thoroughly embedded in the economic life of the country. If it is now desirable to change such a fundamental business practice, it is the duty of Congress to say so in clear unequivocal language which leaves no doubt as to the intention and purpose of Congress.

D. Meeting competition.

Respondents' prices were "in good faith to meet an equally low price of a competitor," under section 2(b) of the Act.

One of the defenses relied upon by respondents is provided and defined by 2(b) of the Act. (15 U. S. C. 13 (b)), which is as follows:

> "Provided, however, that nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The modified findings of fact conclude that respondents' discriminations in prices pursuant to the use of the basing

point pricing system have not been shown to be lower prices made in good faith to meet an equally low price of a competitor within the meaning of the Act. (R. 58.) This conclusion of petitioner is based upon two false premises. The first is the contention of petitioner that for true competition to exist, respondents and their competitors should sell in any given market at different prices, depending upon freight rates applicable to shipments from the respective plants. Petitioner ignores the stipulated evidence that the the quality of corn syrup is substantially the same and that no manufacturer of corn syrup is able to obtain a premium for its product. (R. 19.) Corn syrup is a standardized product. In this respect, it is in the same category with cement.

In *Cement Manufacturers Protective Association, et al. v. U. S.*, 268 U. S. 588, this Court said at page 605:

> "It is conceded that there is a substantial uniformity of price of cement. Variations of price by one manufacturer are usually promptly followed by like variation throughout the trade."

And at pages 605 and 606, the Court said:

> "A great volume of testimony was also given by distinguished economists in support of the thesis that in the case of a standardized product sold wholesale to fully informed professional buyers as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition, and the government in its brief concedes that "Undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers."

Under whatever pricing method respondents might have sold their corn syrup, their delivered prices in any market were necessarily the same as the delivered prices of their competitors. This was the result of competition and not the absence of it. Upon the dates of any of the sales stipulated

in the evidence, respondents' price for corn syrup in Decatur was higher than the delivered price quoted by competitors in Chicago. If respondents were to add freight from Decatur to Chicago to their already higher Decatur price, they obviously would have made no sales in Chicago. The Chicago corn syrup manufacturers would have had a monopoly and respondents' sales would have been restricted to a small area in central Illinois. The inference from petitioner's findings (R. 58) is that the Federal Trade Commission desires to bring about such a situation. However, if respondents were to continue in business, the only course open to them was to fix their price on the lower basis to meet the price of their Chicago competitors and to do the same in other markets. Petitioner concedes that it was necessary for respondents to meet the Chicago prices of their Chicago competitors. (Pet. for Writ of Certiorari, p. 10.)

The second false premise upon which petitioner has proceeded is that respondents' Decatur price should be the same as their Chicago delivered price. It is only by adopting this false premise that petitioner is able to make the statement that "Respondents were discriminating in order to meet (or match) the equally high delivered prices that were calculated on a Chicago basis and were discriminating by the precise amount necessary to meet (or match) such prices. (Pet. Br., p. 19.) Petitioner would ignore all differences in manufacturing costs resulting from geographical location, labor, storage facilities, shipping facilities, availability of raw materials and other numerous factors, and require respondents to establish their mill price in Decatur at the same price as the mill price of Chicago competitors. Petitioner assumes equal production costs (Pet. for Writ of Certiorari, p. 11), but there is no evidence in the record to justify such an assumption. The fallacy

of this position seems obvious, yet that is the very foundation of petitioner's case and that was the basis of the opinions of Judge Minton and Judge Evans in the lower court when they held that respondents' delivered prices were discriminatory.

When respondents were established in the manufacture and sale of corn syrup, their price in Decatur was that which resulted from adding to the mill price of their Chicago competitors the freight from Chicago to Decatur. Respondents had the right to sell in Decatur at the price their Chicago competitors were quoting for similar corn syrup delivered in Decatur. Respondents' customers could not thereby be injured. They simply paid the same price they paid before respondents entered the business. If respondents tried to charge a higher price, the business would all go to respondents' Chicago competitors at their lower price, and respondents would have to lower their price to meet the competition of the Chicago manufacturers. If respondents tried to charge a lower price, their Chicago competitors would have to meet respondents' lower price in order to get any share of the business, with the net result that respondents would simply be doing business in Decatur at a lower profit.

Having established their Decatur price for corn syrup, respondents found that if they added to their Decatur price, freight from Decatur to destination, their price in every market was higher than the prices of their competitors. This is clearly demonstrated by the following table:

(1) Transaction	(2) Date	(3) Location of Purchaser	(4) Decatur Price[1]	(5) Freight Decatur to Destination[2]	(6) Decatur Price Plus Frt.	(7) Competitive Delivered Price[3]	(8) Difference
1.	3/30/37	St. Louis, Mo.	$3.20	0.10	3.30	3.20	-0.10
2.	10/26/38	St. Louis, Mo.	2.27	0.11	2.38	2.15	-0.23
3.	9/29/39	St. Louis, Mo.	2.27	0.11	2.38	2.16	-0.22
4.	6/2/37	Davenport, Ia.	3.20	0.134	3.334	3.20	-0.134
5.	9/26/39	Davenport, Ia.	2.27	0.14	2.41	2.27	-0.14
6.	7/17/36	Ottumwa, Ia.	2.61	0.27	2.88	2.73	-0.15
7.	12/8/38	Ottumwa, Ia.	2.27	0.27	2.54	2.39	-0.15
8.	9/28/39	Ottumwa, Ia.	2.27	0.27	2.54	2.39	-0.15
9.	5/11/37	Sioux City, Ia.	3.20	0.36	3.56	3.50	-0.06
10.	11/27/36	St. Joseph, Mo.	3.21	0.35	3.56	3.42	-0.14
11.	4/30/37	St. Joseph, Mo.	3.20	0.35	3.55	3.40	-0.15
12.	9/27/39	St. Joseph, Mo.	2.27	0.36	2.63	2.49	-0.14
13.	6/5/37	Kansas City, Mo.	3.20	0.355	3.535	3.50	-0.035
14.	11/14/38	Kansas City, Mo.	2.27	0.36	2.63	2.49	-0.14
15.	9/6/39	Kansas City, Mo.	2.27	0.36	2.63	2.49	-0.14
16.	11/28/36	Little Rock, Ark.	3.20	0.535	3.735	3.63	-0.105
17.	9/22/37	Little Rock, Ark.	3.20	0.50	3.70	3.59	-0.11
18.	4/6/37	Shreveport, La.	3.20	0.61	3.81	3.69	-0.12
19.	9/26/38	Shreveport, La.	3.32	0.67	2.99	2.74	-0.25
20.	4/15/39	Shreveport, La.	2.37	0.67	3.04	2.80	-0.24
21.	5/7/37	Dallas, Texas	3.20	0.73	3.93	3.77	-0.16
22.	5/17/37	Dallas, Texas	3.20	0.68	3.88	3.77	-0.11
23.	8/30/39	Dallas, Texas	2.27	0.75	3.02	2.89	-0.13
24.	9/16/39	Dallas, Texas	2.27	0.75	3.02	2.89	-0.13
25.	11/1/39	Dallas, Texas	2.32	0.75	3.07	2.94	-0.14
26.	3/4/38	Farmersville, Tex.	2.41	0.72	3.13	3.01	-0.12
27.	4/17/39	Farmersville, Tex.	2.37	0.72	3.09	2.96	-0.13

1. Taken from Commission's Exhibit 1. (R. 24.)
2. Taken from Respondent's Exhibits 1-A and 1-B. (R. 25, 26.)
3. Taken from Commission's Exhibit 2. (R. 24.)

We use the last transaction in the table as an example. This discloses a sale to a Farmersville, Texas customer at $2.96 per hundredweight. (Col. 7.) At the time this sale was made, the actual Decatur price was $2.37. (Col. 4.) Obviously had respondents added the freight charges from Decatur to Farmersville, Texas in the amount of $0.72 (Col. 5), the price to their Farmersville, Texas customer would have been $3.09. (Col. 6.) However, because respondents had to meet the price of competitors who were selling in Farmersville, Texas at $2.96, they had to reduce their price accordingly. Their delivered price was, therefore, $0.13

less than their price would have been had they sold on the basis of their Decatur price plus freight to destinations. (Col. 8.)

This table demonstrates the fact that an f.o.b. pricing system would have meant that respondents' prices to customers at the destinations selected by petitioner would have been from $0.10 to $0.25 per hundredweight higher than were the actual prices at which the sales were made. Had respondents attempted to maintain such prices, the buyers would have made their purchases from respondents' competitors and respondents would have lost all of such business.

The evidence is uncontradicted that respondents were unable to obtain a premium for their corn syrup. (R. 19.) In order to continue in business, it was necessary for respondents to sell at the same delivered price as their competitors, whatever that might be. (R. 18.) Thereupon, respondents fixed their prices on the lower basis "in good faith to meet the equally lower price of a competitor."

Petitioner relies upon the stipulation that on several occasions since June 19, 1936, respondents increased and reduced their prices in all markets by the same amount per hundredweight without and independent of any similar or prior action by competitors. We submit that the fact that respondents did increase their price independent of action by competitors does not mean, *ipso facto*, respondents have been guilty of price discriminations in violation of the Act. The explanation is obvious. Corn syrup is a standard product for which one manufacturer cannot charge a higher price than other manufacturers selling in the same market. It was only common business sense for respondents to know that when they announced a price change in one market, respondents' competitors,

in order to share in the business in that market, would immediately meet that price change and that such competitors would make corresponding price changes in other markets which respondents would have to meet. Rather than make these price changes piecemeal, respondents chose to make all at one time the price changes which they knew would be inevitable in any event.

For instance, had respondents reduced their price on corn syrup in markets outside of Chicago and had not made a corresponding reduction in Chicago, the Chicago competitors of respondents would have immediately made a price reduction in such market and likewise would have immediately and necessarily extended the price reduction to their customers in Chicago. As soon as the Chicago competitors of respondents reduced their prices in Chicago, respondents would likewise have been forced to reduce their Chicago price in order to meet this competitive condition. To have delayed in announcing their price reduction in Chicago would have afforded respondents' competitors the opportunity to reach some customers first with the price reduction, or had respondents refrained from making the price reduction in Chicago, they would have certainly lost their Chicago customers to competitors.

A similar situation would have developed in case of a price advance. Respondents would have been powerless to confine the advance to Chicago or to any other market or markets. If respondents' Chicago competitors elected to follow the advance in Chicago, they would have to extend the advance to markets outside of Chicago to avoid discrimination between their customers. If competitors failed to follow respondents' price advance, respondents would have been forced to cancel the price advance. To have done otherwise would have resulted in respondents' competitors getting the business from respondents' customers.

Judge Minton recognized this situation in his opinion when he said: "* * * Section 2(b) of the Statute does not require that competitors' prices shall be first announced and promulgated before one may in good faith meet them. The company may very well have known what the competitive situation in their industry was and what was certain to happen. In anticipation of what their competitors were certain to do, the company promulgated prices to meet the foreseen competitive situation." (R. 73.)

II.

Booking Practices.

Paragraph 4 of the modified findings as to the facts (R. 53, 54) is the basis for paragraph 2 of the order. (R. 36.) The practices there described are called "booking practices" and petitioner contends that these booking practices amounted to discriminations by respondents and that they were cumulative to the differentials arising from the use of the basing point pricing system. (R. 53.) These conclusions are not based upon the evidence. There is no evidence of any specific customers or any specific markets in which the booking practices took place. Obviously, it is just as logical and valid an assumption to assume that the price advantages resulting from the booking practices offset the price advantages resulting from the use of the basing point pricing system as would be the opposite assumption. Certainly if the booking practices resulted in an advantage to buyers in markets outside of Chicago, any advantage that the Chicago buyer might have obtained because of the basing point pricing system would have been minimized, eliminated entirely, or perhaps turned into an advantage in the opposite direction.

In its modified findings of fact, petitioner referred to

that part of the stipulation which had reference to the industry practices (R. 20, 21) and not to that part of the stipulation describing the part respondents took in such practices. (R. 21-23.) Respondents did not originate or adopt these abuses but simply met the competition of others where necessary to retain their customers and their business. (R. 21.)

With reference to the first practice, where a salesman or broker informed respondents that one or more of respondents' competitors had granted to one or more customers extensions of time in which to make delivery of syrup formerly booked at the older and lower price, respondents accepted the verbal statement of the buyer or buyers to respondents' salesmen or brokers, "believing such report to be true", and granted similar extensions sometimes to all buyers in all markets, and on some occasions to the particular purchasers involved. (R. 22.)

With reference to the second practice, where respondents received notice from their salesmen or brokers to enter orders for customers, they entered them and later found that some of the orders had not actually been given by the customers. (R. 22.) However, it is obvious that respondents only discovered this in the event no sales were made to those particular customers. It is also obvious that the only transactions in which there could be discriminations were those actually resulting in sales. In those cases, respondents were never informed by buyers that they had not booked the orders. Respondents suspected that some of the bookings for customers who accepted the shipments were originally made without their authority, but respondents had no way of knowing, since these customers accepted the shipments. Naturally, if there are cases in which the customer accepts shipment when his order has not actually been entered, the customer considers it to his advantage to do so, as, for instance, because of a

price increase. There is certainly no evidence that respondents made any delivery to any customer under the circumstances described in this example that were not bona fide. Even though it be assumed that some deliveries were made that were not bona fide and that such deliveries amounted to price discriminations, certainly it would be impossible to determine to what customer, or even to what markets such deliveries were made. *A fortiori* it would be impossible to determine what, if any, effect such assumed discriminations had upon competition.

The third case was where the time for accepting orders had passed and upon occasion candy manufacturers informed respondents verbally and without supporting evidence that one or more of respondents' competitors were prepared to make delivery to the candy manufacturer at the older and lower price. The candy manufacturer offered respondents the business at the lower price. The evidence is that when the customer had convinced respondents that they were meeting competition, respondents agreed to re-price the order to the lower price. (R. 21.)

The fourth case is that when tank wagon buyers were sold corn syrup at the same price as tank car buyers. Where respondents were informed by a buyer that their competitors were engaged in such transactions, respondents, "believing such reports to be true," met such competition by selling such tank wagon buyers at the same price and upon the same conditions as had been offered to the buyers by respondents' competitors. (R. 23.)

In the modified findings of fact, petitioner states its conclusion that respondents "have failed to establish affirmatively that the discriminatory price granted by them through variations of the booking practices were made in good faith to meet an equally low price of a competitor within the meaning of sub-section (b) of Section 2 of the

Statute, and therefore, so finds." (R. 61.) This conclusion is based upon the findings of fact that the respondents were not justified in accepting the unsupported verbal statement of buyers as to prices offered to such buyers by respondents' competitors. (R. 61.)

What evidence is necessary before a seller is justified in meeting the competition of competitors? The Act includes no requirement that any certain kind of evidence must be obtained. It does not require that respondents make "any effort to verify the existence of a lower price by other sellers." It does not state what facts should be obtained which would "lead a reasonable and prudent person to believe that the granting of a lower price would be meeting an equally low price of a competitor." It does not state what a seller must do to exercise "diligence to ascertain such facts." It is only common business knowledge to know that if respondents did not accept the verbal statements of their customers with reference to the price offered to customers by respondents' competitors, respondents lost such customers' business. The customers' word was the best evidence available to respondents. It seems only reasonable that in exercising "good faith" to meet the price of a competitor, a seller should be justified in relying upon the "good faith" of his customer.

The Courts will presume that a person obeys the law and acts in good faith unless the contrary is shown.

Fidelity & Deposit Co. of Maryland v. *Grand Nat'l Bank of St. Louis*, 69 Fed. (2d) 177 at page 183.

Missouri Pacific Railroad Co. v. *Prude*, 265 U. S. 99 at page 101.

Wilson v. *The City Bank of St. Paul*, 84 U. S. 723 at page 728.

Flynn & Emrich Co. v. *Federal Trade Commission*, 52 Fed. (2d) 836 at Page 838.

One of the new amendments to the Clayton Act as provided by the Robinson-Patman Act was Section 2(f), (App. 29) which makes it unlawful for a buyer to knowingly induce or receive a prohibited discrimination. We submit that respondents were entitled to presume that their customers would not violate this section of the Act, and upon such presumption, were justified in believing the statements made to them by their customers.

The Statute under which this defense was presented merely provides that nothing contained in the sections named "shall prevent a seller rebutting the prima facie case thus made", by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. This showing was made in the stipulation and it was not met or questioned by other evidence offered by petitioner. Under the Statute, the only burden respondents had was to rebutt the prima facie case made by petitioner. This, respondents did, and we submit that the findings and conclusions of petitioner are erroneous and are not supported by the evidence. As a matter of fact, in so far as the "booking practices" were concerned, petitioner did not make out a prima facie case. It made out no case of any kind. The only evidence in the record relating to "booking practices" was offered by respondents. (R. 18, 20-23.)

Conclusion.

Respondents submit that the decision of the Court below should be affirmed.

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Attorneys for Respondents.

February, 1945.

APPENDIX.

Statutes.

Section 2, Clayton Act (prior to amendment by Robinson-Patman Act):

"SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession, or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (38 Stat. 730.)

Section 2(a), Clayton Act (as amended by the Robinson-Patman Act):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale

within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent persons engaged in selling goods, wares or merchandise in commerce, from selecting their own customers in bona fide transactions, and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13(a).)

Section 2(b), Clayton Act (as amended by the Robinson-Patman Act):

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13 (b).)

Section 2(f), Clayton Act (as amended by the Robinson-Patman Act):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." (38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13 (f).)

Congressional Debate.

House of Representatives.

Mr. Patman: "The House Bill as reported by the Committee under Section 5 contains a definition of price which is really an anti-basing point provision. The Judiciary Committee, however, met today and passed a resolution requesting the chairman to introduce an amendment on the floor striking this provision from the bill. This meets with my approval and I am sure will meet with the approval

of a majority of the members of the house * * *." (80 Cong. Rec. 7760.)

* * * * *

Mr. Sabath: "* * * It is true that there are objectionable features, namely, the antibasing point and the classification provision. But I want to inform the House that the Judiciary Committee has agreed to move to eliminate both of these provisions from the bill. Likewise, if it is shown that other features are objectionable, they may be modified." (80 Cong. Rec. 8102.)

* * * * *

Mr. Miller: "* * * The next amendment that will be offered by the committee as a committee amendment will be directed at subsection (5) on page 7, which is the basing point provision in the bill."

Mr. Rich: "Does the gentleman mean to strike out the whole section?"

Mr. Miller: "That amendment will be for the purpose of striking out all of subsection (5), or the basing point provision in the bill. Probably that provision should not have been put in a bill amending the Clayton Act; but it was put in and the committee has decided to offer an amendment to take it out." (80 Cong. Rec. 8106.)

* * * * *

Mr. Patman: "* * * Farmers' organizations sent letters to all the Members saying they were opposed to certain things; I learned through their representatives in Washington 2 or 3 weeks ago they were opposed to the basing-point provision of the bill, section 5. So I took it up with the Judiciary Committee. The committee members had heard similar complaints and the committee at a meeting agreed to cut out the basing-point provision. This silenced a lot of the opposition. The basing point is not directly related to what we are trying to do, as I view it, so it was all right to cut this out." (80 Cong. Rec. 8113.)

* * * * *

Mr. Boileau: "Another objection raised by these farm leaders was with respect to the anti-basing-point provision. They felt that this was a dangerous feature of the bill. I personally would rather have that anti-basing-point provision in the bill, but the committee, in its wisdom, will submit a committee amendment striking it out. The members of the steering committee believe that in order to insure its enactment we should eliminate this provision, and, although personally I would prefer that it remain in the bill, I am nevertheless willing to go along. I am pleased that in this respect we are meeting the demands of the farm organizations with whom I have always tried to cooperate, both as a member of the Committee on Agriculture and as a Member of the House, and whose views I have welcomed at all times in the consideration of this bill.'"

"I have given consideration to their needs as a member of the Patman committee investigating chain stores, and as a member of the executive committee of the Steering Committee organized to promote the adoption of this bill. It is now agreed that the anti-basing-point provision is to be eliminated. So far as I am concerned, I would like to see it remain in the bill, because I do not believe it to be dangerous, but in the interest of the passage of the measure, and because of the apparent apprehension of the farm leaders, I am going to vote to take it out." (80 Cong. Rec. 8122.)

* * * * *

Mr. Brown of Michigan: "I want to congratulate the committee for eliminating this provision from the bill at the request of many of us. If the section had remained in, it would be ruinous to small town industry located some distance from the market."

Mr. Citron: "Mr. Chairman, will the gentleman yield?"

Mr. Miller: "I yield."

Mr. Citron: "Mr. Chairman, if this provision remains in the bill, it would result in forcing f. o. b. shipping prices

on manufacturers; but with this provision eliminated they will not be forced to charge f. o. b. shipping point prices. Otherwise, many would not be able to compete with foreign manufacturers, for instance, from Canada, who would not be subject to this provision if it remained in the bill."

"As a member of the Judiciary Committee I voted to eliminate this paragraph, no. 5. I advocated the elimination of this paragraph in the committee, because I considered it would result in a hardship to the manufacturing industry of this country and of my own State."

"This paragraph in this bill that we are eliminating is as follows:

> (5) That the word "price" as used in section 2 shall be construed to mean the amount received by the vendor after deducting freight or other transportation, if any, allowed or defrayed by the vendor.

Reasons Against Limiting Manufacturers To F. O. B. Shipping Point Price in Amending Our Antitrust Laws.

"I believe that there are very important reasons why this paragraph should be eliminated entirely, not only for the reason that there is already under consideration a bill which has separately and wholly to do with the basing-point price method, and on which committee hearings have been held, but also for the reason that the basing-point price method has some economically sound merits, and to prohibit the legitimate carrying on of this pricing system by industries will have serious consequences in many industries doing business within the confines of the United States. There is still a further most important reason why this particular definition of price should be eliminated from the instant bill, which is that it would compel all manufacturers and wholesalers under the jurisdiction of the United States Government to ship all their merchandise on an f. o. b. point of origin basis and the consequences of such a statute would be to place many of our manufacturers and wholesalers at a serious disadvantage when competing with foreign manufacturers and exporters who do business in the United States."

"But a more serious consequence of the inclusion of this definition of price, as previously stated, would be to compel all manufacturers to ship f. o. b. shipping point, and therefore compel the very definite localization of operations of all manufacturers and wholesalers, which would have the immediate effect of increasing costs as the result of seriously limited volume production."

Volume Production.

"Volume production is the very lifeblood of many types of industries. If the products they manufacture cannot be made in large volume, upon which the low cost is dependent, the cost of the finished product would be so high that it would seriously curtail, if not entirely prohibit, their consumption."

"This paragraph would seriously affect the publishers of national magazines, because it may mean that the national publishers cannot sell their magazines not only for the reason that the freight charges on the magazines to distant points will be so great as to prohibit the sale of the magazines at those points, but also for the reason that the magazines are dependent upon advertising revenues derived from national distributors whose operations will be seriously curtailed by this definition of price."

"If this paragraph remains in this bill, it will mean the increased centralization of manufacturing in the more thickly populated industrial centers."

"Some people say these consequences can easily be offset by manufacturers and wholesalers establishing wholesale-distributing points all over the United States. However, this would mean increasing the number of operations and the amount of handling, all of which entails increased cost which the consumer must pay, and only the larger manufacturers in the country would finance the cost, and it would mean the further submergence of the small industry and the small-business man, which would actually tend to enhance monopoly in all branches of industry."

I advocate Protection For Connecticut Industry Against Any Unfair Foreign Competition

"Another very serious objection to this paragraph is that in many instances our manufacturers and wholesalers would be placed at a serious disadvantage in meeting competition of manufacturers in other countries. Take an instance from my own State—the Scovill Manufacturing Co., a large and old established concern which manufacture thousands of different kinds of metal products, from articles for personal use—such as buttons—to parts to be used in the manufacture of other merchandise. Under the terms of this definition of price in the instant bill, they would be compelled to charge freight from Connecticut to New York City, to Baltimore, to New Orleans, to San Francisco, to Detroit, or to Chicago, just to mention a few major manufacturing centers. A manufacturer in the same kind of business, located in Canada or in Europe, or any other industrial country, and who is not subject to the jurisdiction of our Federal statutes, would be able to deliver his products f. o. b. to every one of these industrial cities which I have mentioned for the reason that they are all direct ports of entry into the United States. By the wording of this definition of price in this paragraph, the Scovill Manufacturing Co. could not meet the foreign competition, nor could any other manufacturer in the United States, under like conditions, meet that competition. The only way open to them would be to set up manufacturing branches in Canada, which would have the effect of further increasing unemployment in the United States."

"Because of the reasons that I have given, I also favor the exclusion of this paragraph."

Mr. Miller: "I think the amendment ought to be adopted. I doubt whether that provision ought ever to be in this kind of bill anyway." (80 Cong. Rec. 8223, 8224.)

* * * * * *

Mr. Robinson: "* * * There were two features, however, on which we were not in full agreement. Many of us opposed section 5, on page 7, of this bill. It is the so-called price-fixing or basing-profit provision. It has been

unanimously agreed that that section go out; * * *."
(80 Cong. Rec. 8130.)

* * * * *

Mr. Miller: "* * * The second amendment which the Committee on the Judiciary will offer is to lines 20 and 23 on page 7 of the committee amendment to the bill, and the amendment will be a motion to strike said lines 20 to 23, both inclusive, therefrom.

"This particular section which the committee will seek to strike out is designated as subsection (5) on page 7, and is what is commonly called the basing-point provision." (80 Cong. Rec. 8139, 8140.)

* * * * *

Mr. Utterback: "* * * But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill". (80 Cong. Rec. 9116.)

* * * * *

Senate.

Mr. Davis: "Mr. President, if I may have the attention of the Senator from Idaho, I should like to ask him whether this proposed legislation changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries.

Mr. Borah: "I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry."

Mr. Davis: "Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry."

Mr. Borah: "My opinion would be that this does not have any effect upon that. I defer to the judgment of the Senator in charge of the bill, but that would be my impression."

Mr. Van Nuys: "The Senator from Idaho is correct."
(80 Cong. Rec. 10018.)

Werne, "Business and the Robinson-Patman Law."

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"The report of the Federal Trade Commission to the President on Steel Sheet Piling,[1] the Wheeler Anti-Basing Point Bill,[2] and the Government's attitude toward uniform prices[3] again focus the attention of businessmen on the legality, as well as the commercial value, of basing point or freight zoning systems. There has been a pronounced trend in recent years for sellers to meet competition by adopting various more or less mechanical methods of dealing with freight costs in arriving at a final sale price.[4] Thus, in an increasing number of industries the practice of employing 'basing-point', 'multiple basing-point', and 'delivered price' systems has become customery.[5]

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The single basing-point system was one of the earliest methods of arriving at an artificial equalization of freight charges. The need for added basing points due to competition from factories in new localities has led to the so-called multiple basing-point system, wherein prices are determined as of the basing point nearest to the purchaser. Other systems are to sell on a flat delivered price for a

1. Fed. Trade Comm., Report on Steel Sheet Piling, 1936.

2. See Hearings before Senate Committee on Interstate Commerce on S. 4055: 74th Cong., 2d Sess.

3. Id. at 286-288; see Editorial, N. Y. J. Comm., June 23, 1936, p. 2, col. 1.

4. Fed. Trade Com., supra note 1, at 37-39.

5. The following industries use a zone price system: iron and steel, tobacco products, thread, stoves, mahogany, asphalt, mastic tiles, salt, bathtub, alcohol, coffee, soap, corn products, linseed products, cereal products, newsprint, paper, gasoline and oil products, wire and cable, valve and fittings.

The following industries use basing-point systems (or modifications thereof): lumber, steel and iron, cement, zinc, corn products, copper, fertilizer, gasoline, lead, sugar, laundry machinery, crane and shovels, flour, range boilers, bolts, nuts and rivets, cast iron pipe, asphalt roofing, linseed oil. It should be noted that some materials are sold part on one and part on the other system. Generally speaking, the industries using such freight systems are those which have standardized products, or products which conventionally are of uniform grade and quality.

given area or for the entire country, or to divide the country into freight zones and sell products at a uniform

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delivered price for each zone. All of these systems have much the same purpose and in general operate with similar effect, although the economic situation in some industries seemed to make one system more adaptable than another.

Any discussion of the law of such freight systems requires a clear understanding of the economic background of the various practices.[18] The Supreme Court has repeatedly pointed out the necessity of clearly understanding the factual background in each anti-trust case.[19] For that reason the facts which are typical of a number of manufacturing industries will be set forth briefly.

The manufacturers in these industries, which in the main had grown up along the Atlantic seaboard, originally sold their products f.o.b. factory, charging the actual freight to the destination if a delivered price were desired. By the early years of the twentieth century some companies had varied this method of arriving at a sale price, so that some large producers sold at a uniform delivered price in each state, while others sold on actual freight east of the Mississippi River and had adopted a modified basing-point system west of the Mississippi. During the World War the War Industries Board adopted a plan in placing orders for cantonment camps in order to insure an adequate supply of equipment. After the War and the depression of 1920, the practices of these industries were rapidly becoming more uniform in sales of competing products. Products which were smaller in size and weight, since they were not subject to such noticeable price variations

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18. For a good discussion of the general economic background of such freight systems see Burns, The Decline of Competition (1936) 280-371.

19. *Appalachian Coals v. United States*, 288 U. S. 344, 360-361, 53 Sup. Ct. 471 (1933); *Sugar Institute v. United States*, 297 U. S. 553, 56 Sup. Ct. 629 (1936).

when the actual freight was charged, generally used a close approximation to the actual freight rates from the point of production to those of consumption. The larger and heavier products, for which price variations due to

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freight costs were substantial, came to be sold by most producers on a basing-point or a freight-zone system.

The N. R. A. took no stand on the question of geographical discrimination in price.[20] As a result, a number of the codes provided for freight-zone, basing-point, or delivered systems.[21] In industries such as lumber, cement and insulated cable, where these practices had become an industry custom or practice before the codes, they were continued under them, and the practices became more standardized due to the existence of open price filing provisions in the codes. All of the N. R. A. codes had a pronounced effect upon their respective industries in crystallizing and unifying industry practices, especially if they provided for open price filing.[22] The termination of the N. R. A. era, therefore, generally left industry practices stabilized.

20. But see Richberg's remarks in Hearings before Senate Committee on Interstate Commerce, supra note 2, at 85-86: "It was our observation, and it was the opinion of the experts outside whose aid we obtained, that a basing-point system in which every producing area was a basing point would be a sound and economical system and good business practice. In other words, if there were a lot of mills within a small radius of 25 to 50 miles of Pittsburgh, as a business practice there was nothing wrong, and a great deal of convenience and benefit in having one basing-point for that area. The evil in the basing-point system that seemed to me evident from the beginning, and which I think is partly historical growth and partly the result of the power of certain large interests in the industry, has been the denial of basing-points to certain producing areas that ought to have basing-points, and, as a result, the establishment of artificial basing-points in nonproducing areas, giving a special advantage to the producing areas which did have basing-points."

21. Six codes provided for freight systems. They were: Fertilizer, Petroleum, Business Furniture, Storage and Filing Equipment, Salt, and Shovel Dragline and Crane. Five codes provided for basing-points. They were: Cast Iron Pipes, Iron and Steel, Lime, Refractories, and Reinforcing Materials. Thirty-three other codes provided for delivered prices of some kind. For further material see Consumer Advisory Board, Appendices to Memorandum to General Johnson, Feb. 19, 1934.

22. Fed. Trade Comm., supra note 1, at 6.

The fact that most of the factories in many industries were located in New York, New Jersey, Pennsylvania and Connecticut seemed to aid those industries in arriving at freight systems. The freight zones, then, which these industries use, represented places which would have had approximately equal freight rates for goods shipped from New York City, and the freight-zone charges were approximations of actual freight costs. As factories were built in other sections of the country, freight-zone charges bore less relation to the actual costs of transportation.

When basing-point or freight-zone systems are employed, prices are generally quoted on a delivered-price basis. As a result, customers are not aware of how much of the final price is in fact a charge for freight.[23] Under these systems each manufacturer defrays at times a part of the actual transportation costs; at other times he may receive more than the actual freight costs if he is located near the consumer, and he charges the railroad freight from some recognized center of production or an average zone freight rate.

23. Hearings before Senate Committee on Interstate Commerce, supra note 2, at 322.

SUPREME COURT OF THE UNITED STATES.

No. 559.—October Term, 1944.

Federal Trade Commission, Petitioner, *vs.* A. E. Staley Manufacturing Company and Staley Sales Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 23, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Respondents, a parent company and its sales subsidiary, are engaged in the manufacture and sale of glucose or corn syrup in competition with others, including the Corn Products Refining Company, whose methods of marketing and pricing its products are described in our opinion in *Corn Products Refining Company* v. *Federal Trade Commission*, No. 680, decided this day. Respondents, in selling their glucose, have adopted a basing point delivered price system comparable to that of the Corn Products Refining Company. Respondents sell their product, manufactured at Decatur, Illinois, at delivered prices based on Chicago, Illinois, the price in each case being the Chicago price plus freight from Chicago to point of delivery.

In this proceeding, brought under § 11 of the Clayton Act, c. 323, 38 Stat. 730, 15 U. S. C. § 21, the Federal Trade Commission charged that respondents' pricing system resulted in price discriminations between different purchasers of glucose in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, c. 592, 49 Stat. 1526, 15 U. S. C. § 13. The case was heard by the Commission on stipulations of facts and exhibits, upon the basis of which the Commission ultimately made its findings. Applying the same principles as in the *Corn Products Refining Company* case, it concluded that respondents had made discriminations between different purchasers in the price of their product; and that respondents were unable to justify the discriminations, as permitted by § 2(b) of the Clayton Act, by showing that they were

made "in good faith" to meet a competitor's equally low price. The Commission accordingly made its order directing respondents to cease and desist from the price discriminations.

On review of the Commission's order, the Court of Appeals for the Seventh Circuit set the Commission's order aside, one judge dissenting. 144 F. 2d 221. One of the majority judges did not consider whether the price discriminations violated § 2(a), but held that in any event they were made in good faith to meet their competitors' price within the meaning of § 2(b). Another concurred in the result on the ground that the Commission had failed to make out a case of unlawful price discrimination, and for that reason he found no occasion to pass upon the merits of respondents' defense. The third judge dissented on the ground that respondents' discriminations were unlawful and not justified by competition. We granted certiorari. 323 U. S. —.

The principal question for decision is whether respondents, who adopted the discriminatory price system of their competitors, including the Corn Products Refining Company, have sustained the burden of justifying their price system under § 2(b) of the Clayton Act, as amended, by showing that their prices were made "in good faith" to meet the equally low prices of competitors. A further question is whether there was evidence to support the Federal Trade Commission's findings that respondents, in granting to certain favored buyers, discriminatory prices for their product, did not act "in good faith" to meet a competitor's equally low price within the meaning of § 2(b) of the Clayton Act.

The Commission found that at all relevant times respondents have sold glucose, shipped to purchasers from their plant at Decatur, Illinois, on a delivered price basis, the lowest price quoted being for delivery to Chicago purchasers. Respondents' Chicago price is not only a delivered price at that place. It is also a basing point price upon which all other delivered prices, including the price at Decatur, are computed by adding to the base price, freight from Chicago to the point of delivery. The Decatur price, as well as the delivered price at all points at which the freight from Decatur is less than the freight from Chicago, includes an item of unearned or "phantom" freight, ranging in amount in instances mentioned by the Commission, from 1 cent per hundred pounds at St. Joseph, Missouri, to 18 cents at Decatur. The Chicago price, as well as that at points at which the freight from Decatur exceeds

freight from Chicago required respondents to "absorb" freight, varying in instances cited by the Commission from 4 cents per one hundred pounds at St. Louis, Missouri, to $15\frac{1}{2}$ cents per hundred pounds at Chicago.

The Commission found that this inclusion of unearned freight or absorption of freight in calculating the delivered prices operated to discriminate against purchasers at all points where the freight rate from Decatur was less than that from Chicago and in favor of purchasers at points where the freight rate from Decatur was greater than that from Chicago. It also made findings comparable to those made in the *Corn Products Refining Company* case that the effect of these discriminations between purchasers, who are candy and syrup manufacturers competing with each other, was to diminish competition between them.

The Commission also found that respondents, during a period of from five to ten days after they advance the prices of their product, customarily permit purchasers generally to "book" orders or secure options to purchase glucose at the old price, for delivery within thirty days, but that they also have permitted certain favored purchasers to secure additional extensions of time for delivery upon such options. In consequence of these time extensions, the favored buyers were enabled to secure glucose at a lower price than that concurrently being charged to other buyers. In some instances, after a price advance, respondents also made fictitious bookings on which deliveries were later made, at the option of the favored buyers; and in still other cases sales were made to favored purchasers long after the expiration of the booking period. Respondents also book glucose in tank car lots to certain purchasers who lack storage facilities for such quantities; respondents then actually make deliveries in tank wagon lots over a period of many months, during which they are selling to others upon like deliveries at higher prices.

These findings and the conclusion of the Commission that the price discriminations involved are prohibited by § 2(a), are challenged here. But for the reasons we have given in our opinion in the *Corn Products Refining Company* case the challenge must fail. The sole question we find it necessary to discuss here is whether respondents have succeeded in justifying the discriminations by an adequate showing that the discriminations were made "in good faith" to meet equally low prices of competitors.

I.

We consider first, respondents' asserted justification of the discriminations involved in its basing point pricing system. As we hold in the *Corn Products Refining Company* case with respect to a like system, price discriminations are necessarily involved where the price basing point is distant from the point of production. This is because, as in respondents' case, the delivered prices upon shipments from Decatur usually include an item of unearned or phantom freight or require the absorption of freight with the consequent variations in the seller's net factory prices. Since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by § 2(a), whenever they have the defined effect upon competition.

Respondents sought to justify these discriminations before the Commission, by a stipulation detailing the history and use of their present pricing system. From this it appears that in 1920, when respondents began the manufacture of glucose or corn syrup, they found that syrup manufactured by their competitors "was being sold at delivered prices in the various markets of the United States;" that in Chicago two large factories were manufacturing syrup and delivering it in Chicago at prices lower than prices then prevailing in any other market; and that the delivered price in such other markets was generally equal to the Chicago price plus the published freight rate from Chicago to the point of delivery. Respondents thus found in operation a pricing system which, if followed, would produce exact identity in prices of glucose of the several producers when sold in any city of the United States. Respondents, to gain access to the markets thus established, made their sales "by first quoting the same price as were quoted by competitors and then making whatever reduction in price . . . was necessary to obtain business." When respondents soon found that their product would command the same market price as that of their competitors, they "adopted the practice of selling at the same delivered prices as [their] competitors, whatever they might be." Respondents have followed the same practice since June 19, 1936, the date of enactment of the Robinson-Patman Act.

Section 2(b) of the Clayton Act provides:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . , the burden of rebutting the prima-facie case

thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . .''

It will be noted that the defense that the price discriminations were made in order to meet competition, is under the statute a matter of "rebutting" the Commission's "prima-facie case." Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it "shall prevent" discriminations in price "made in good faith to meet competition." The change in language of this exception[1] was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6-7; see also the statement of Representative Utterbach, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418.

But respondents argue that they have sustained their burden of proof, as prescribed by § 2(b), by showing that they have adopted and followed the basing point system of their competitors. In the *Corn Products Refining Company* case we hold that this price system of respondents' competitor in part involves unlawful price discriminations, to the extent that freight differentials enter into the computation of price, as a result of the selection as a basing point of a place distant from the point of production and shipment. Thus it is the contention that a seller may justify a basing-point delivered price system, which is otherwise outlawed by § 2, because other competitors are in part violating the law by

[1] As originally introduced, the Robinson-Patman amendment contained no provision similar to that in § 2 of the Clayton Act as originally enacted, which provided "That nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition." In the Senate this existing provision was added by amendment to the Robinson-Patman bill. 80 Cong. Rec. 6426, 6435. In the House, the Judiciary Committee reported the bill with the proviso, substantially as enacted in § 2(b). 80 Cong. Rec. 8139. The Conference Committee rejected the Senate version and approved the House amendment. The Report of the Conference Committee, speaking of the Senate proviso, said: "This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. . . . A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission, is included in subsection (b). . . ." H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6-7.

maintaining a like system. If respondents' argument is sound, it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. Respondents are here seeking to justify delivered prices which discriminate in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, by a pricing system involving phantom freight and freight absorption. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by § 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another.[2]

The statutory test is whether respondents, by their basing point system, adopted a "lower price . . . in good faith to meet an equally low price of a competitor." This test presupposes that the person charged with violating the Act would, by his normal, non-discriminatory pricing methods, have reached a price so high that he could reduce it in order to meet the competitor's equally low price. On the contrary, respondents have used their pricing system to adopt the delivery prices of their Chicago competitors, by charging their own customers upon shipments from Decatur the Chicago base price plus their competitors' costs of delivery from Chicago. Even though respondents, at many delivery points, enjoyed freight advantages over their competitors, they did not avail of the opportunity to charge lower delivered prices. In-

[2] The Chairman of the House Conferees, in presenting the Conference Report, emphasized with illustrations, that "this procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violations of the obvious intent of the bill." See 80 Cong. Rec. 9418.

stead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices.

Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition. Instead they have slavishly followed in the first instance a pricing policy which in their case, resulted in systematic discriminations, by charging their customers upon shipments from Decatur, the Chicago base price plus their competitors' actual costs of delivery from Chicago. Moreover, there is no showing that if respondents had charged non-discriminatory prices, they would be higher in all cases than those now prevailing under their basing point system. Hence it cannot be said that respondents' price discriminations have resulted in "lower" prices to meet equally low prices of a competitor.

Respondents make an ingenious argument that they could have used their present price for deliveries at Decatur (which is the Chicago base price plus freight from Chicago to Decatur) as their base price; and that with the addition of freight from Decatur to the points of delivery, the delivered prices would in all cases then be higher than the present prices, so that reduction to meet the lower prices of their competitors would be permissible under § 2(b). But this is no answer to the ruling of the Commission that the competitive situation did not justify respondents' pricing system, since respondents' argument is based upon a hypothesis, which never in fact existed. The fact that respondents' prices are lower than those they might have charged, but never did charge, does not tend to show the establishment of a lower price to meet an equally low price of a competitor.

Further, we cannot say that respondents' discriminations in price were shown to have been made in a "good faith" effort to meet competition, as § 2(b) requires. As we have pointed out here and in our opinion in the companion case, *Corn Products Refining Company v. Federal Trade Commission, supra*, the basing point system used by respondents discriminates systematically in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, and against purchasers at Decatur and points nearer to it, by reason of respondents' absorption of freight and collection of phantom freight.

This is illustrated most graphically by respondents' delivered prices at Decatur and Chicago. On August 1, 1939, these were $2.09 at Chicago, and $2.27 at Decatur. Since respondents incurred 18 cents freight in shipping to Chicago, their net price at the Decatur factory on shipments to Chicago, was $1.91. The discrimination in favor of Chicago and against Decatur was thus 36 cents, or 17 per cent of the Chicago price, in a field where a difference of a fraction of a cent in the sales price of the candy processed from the glucose could divert buyers from one candy manufacturer to another. Only to a lesser degree are there like discriminations when other points of delivery are compared.

The Commission's conclusion seems inescapable that respondents' discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago prices of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system. The systematic adoption of a competitor's prices by including unearned freight in respondents' delivery price or, what amounts to the same thing, the maintenance of a discriminatory and artificially high f. o. b. factory price in order to take advantage of the correspondingly high prices of a competitor, based on its higher costs of delivery, is not sufficient to justify the discrimination, for respondent fails to show, as the statute requires, the establishment of a "lower price" made in good faith to meet the equally low price of a competitor. By adopting the price system of their competitors, respondents have succeeded in many instances in establishing an artificially high price and have thus secured the benefit of the high price levels of a competitor whose costs of delivery are greater.

A price discrimination is measured by the difference between the high price to one purchaser and the lower price to another. Respondent's price discriminations were not dictated by the lower delivery costs or lower delivery prices of their competitors. In none of the markets in which respondents had a freight advantage over their Chicago competitors did respondents reduce their prices below those of their competitors. Instead they met and followed their competitors' prices by prices rendered artificially high, by the inclusion of unearned freight proportioned to the amount by which their competitors' delivered costs exceeded their own.

We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least

where it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance. And for like reasons, we must reject respondents' argument that the Commission's order could be rendered nugatory by respondents' establishing such a high factory price as always to admit of reductions in order to meet the prices of competitors who are using a Chicago basing point system. For we think it could not be said that this practical continuation of the present discriminatory basing point system would be in good faith. But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price.

Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In the present case, the Commission's finding that respondents' price discriminations were not made to meet a "lower" price and consequently were not in good faith, is amply supported by the record, and we think the Court of Appeals erred in setting aside this portion of the Commission's order to cease and desist.

II.

The Commission found that respondents had not sustained the burden of rebutting the prima facie case of price discriminations involved in their booking practices, since they had failed to show that their lower prices were "made in good faith to meet an equally low price of a competitor". The facts as stipulated were only that the discriminations were made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence, to the effect that in each case one or more competitors had granted or offered to grant like discriminations. It is stipulated that respondents, "believing such report to be true, has then granted similar" price discriminations. The record contains no statements by the persons making these reports and dis-

closes no efforts by respondents to investigate or verify them, and no evidence of respondents' knowledge of their informants' character and reliability. It is admitted that in some instances respondents made sales upon bookings which they suspected had been made without knowledge of the buyers.

In appraising the evidence, the Commission recognized that the statute does not place an impossible burden upon sellers, but it emphasized the good faith requirement of the statute, which places the burden of proving good faith on the seller, who has made the discriminatory prices. The Commission commented on the tendency of buyers to seek to secure the most advantageous terms of sales possible, and upon the entire lack of a showing of diligence on the part of respondents to verify the reports which they received, or to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor. The Commission thought that respondents' allowance of discretionary prices, in circumstances which strongly suggested that the buyers' claims were without merit, as well as respondents' readiness to grant discriminatory prices without taking any steps to verify the existence of a lower price of competitors, and the entire absence of any showing that respondents had taken any precaution to conduct their business in such manner as to prevent unwarranted discriminations in price, all taken together, required the conclusion that respondents had not sustained the burden of showing that their price discriminations were made in good faith to meet the lower prices of competitors.

Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances, which are peculiarly favorable to price discrimination abuses. We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a

competitor. Nor was the Commission wrong in holding that respondents failed to meet this burden.

The appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn., supra,* 63; *Federal Trade Commission* v. *Algoma Lumber Co., supra,* 73. We cannot say that the Commission's inference is not supported by the stipulated facts or that its inference does not support its order.

The Commission's order will be sustained. The judgment below will be reversed, and the cause remanded with instructions to enforce the Commission's order.

So ordered.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

Mr. Justice JACKSON concurs in the result.